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Tan Ong Ban v Teoh Kim Heng

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-53–06 OF 2014(P)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ABDULL HAMID EMBONG, HASAN LAH AND ABU SAMAH NORDIN FCJJ
1 JANUARY 2016

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Land Law — Indefeasibility of title and interests — Beneficial ownership of property — No strata title issued in respect of property — Appellant claimed better title to property it acquired upon executing first SPA — Respondent acquired property upon executing third SPA and settling purchase price in full — Whether D *first SPA remained valid and enforceable — Whether respondent bona fide purchaser for value — Whether s 340(3) of the National Land Code applied to present case — Whether principle of beneficial ownership applied equally to contract in statutory format as well as negotiated contract — Whether respondent acquired indefeasible title to property — Whether appellant acquired right in rem* E *or right in personam*

At all material times prior to its liquidation, Juara Aspirasi (M) Sdn Bhd ('JAS'), a licensed housing developer, had undertaken the development of an apartment unit situated in Bandar Jelutong, Penang ('the property'). JAS as F vendor had entered into a sale and purchase agreement ('the first SPA') to sell the property to the appellant for the agreed purchase price of RM35,000, with the purchase price to be settled in the manner spelt out in the Fourth Schedule to the first SPA. Subsequently JAS entered into a fresh sale and purchase agreement in respect of the property ('the second SPA') with one Mohd Ismail G bin Md Ibrahim ('Ismail'). The agreed purchase price of RM50,000 was fully settled by Ismail, who in turn sold the property to the respondent (the third SPA), who also paid the purchase price in full. Upon obtaining vacant possession of the property, the respondent commenced renovation work on the property. When the appellant had visited the property and discovered the H respondent carrying out renovation works on the property, he had lodged a police report alleging that someone had trespassed onto the property. In his defence the respondent had claimed that he was the beneficial owner of the property, having purchased the property from Ismail for valuable consideration. As such, the respondent argued that the appellant's grievance, if I any, ought to be directed towards JAS with whom he had signed the first SPA. In the meantime, the appellant had been informed by Januari Property Sdn Bhd, a company purportedly representing JAS, that the first SPA had been terminated and enclosing a cheque for RM5,250. The appellant objected to the termination on the grounds that JAS had no valid reason to terminate the first

SPA and returned the cheque to the developer. Thereafter, the appellant commenced an action against the respondent and JAS whereby it claimed a number of declaratory reliefs with regard to the legal status of the three SPAs and for an injunction to stop the respondent from trespassing onto the property. In opposing the claim, the respondent averred that he was neither a party nor privy to the first and second SPAs. He also contended that he had paid the full purchase price to Ismail and was as such a bona fide purchaser for value having good and inviolable interest in the property. JAS, which was in liquidation, had taken the stand not to defend the suit. The trial judge found that the first SPA remained valid and subsisting and enforceable and that the alleged subsequent disposal of the property by Ismail to the respondent was invalid, null and void. As such, the High Court found in favour of the appellant and allowed his claim. The respondent appealed to the Court of Appeal, which ruled that the respondent was a bona fide purchaser for value without notice clothed with the statutory protection accorded by s 340 of the National Land Code ('the NLC'). That being the case, the Court of Appeal held that the respondent had acquired an indefeasible title to the property. The appellant had then applied for and obtained the leave of the Federal Court to proceed with the present appeal. The appellant submitted that the Court of Appeal had committed a serious and fundamental error of law by misapplying s 340 of the NLC to the facts of the present appeal. According to the appellant s 340(1) of the NLC could not apply to strata property in respect of which no register document of title had been issued by the appropriate authority and since the strata title of the property had yet to be issued, s 340 had no application to the present case.

Held, dismissing the appeal with costs:

(1) Section 340(1) of the NLC only referred to registered title or interest. It was common ground that at the material date no strata title in respect of the property had been issued by the authority. As the strata title to the property had not been issued, s 340(3) of the NLC did not apply to the present case (see paras 21 & 54).

(2) The principle of beneficial ownership differentiates between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothed a purchaser who had settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she had yet to be registered as the proprietor of the property. Although the High Court in the present case held that the principle of beneficial ownership did not apply because the contract entered upon by the parties was in the statutory form as prescribed by the Housing Developers (Control And Licensing) Act 1966 ('the Act'), the principle of beneficial ownership should apply equally to both negotiated contracts as well as statutorily formatted contract. There was no valid reason to distinguish between the two transactions. The intention of the

Act as well as the subsequent enactments and the subsidiary legislations was to merely protect the intending purchaser and was not intended to abrogate or undermine the rights of a purchaser under the common law or in equity. Therefore, on the authorities the principle of beneficial ownership applied equally to a contract in a statutory format as well as a negotiated contract (see paras 36 & 40–43).

(3) It is trite that in a transaction involving landed property, the principle under the law of contract would govern the sale transaction until registration of title was effected under the provisions of the NLC. Therefore, based on the ordinary sale and purchase transaction, the purchaser would acquire, a right in rem or a right in personam. Applying the legal principles to the facts of the present case it was clear that the respondent, who had paid the purchase price in full, was the beneficial owner of the property and enjoyed a right in rem over the property, while the appellant, who had not paid the full purchase price of the property, was at best clothed with a right in personam as against the respondent upon the execution of the first SPA and payment of the sum of RM5,250 to JAS. As such, the appellant's right was purely contractual in nature as against JAS and no cause of action could lie against the respondent, who was a complete stranger to the contract. Unfortunately, the appellant was left without remedy as JAS had been wound up (see paras 46, 48, 50–51 & 53).

[Bahasa Malaysia summary

Pada setiap masa matan sebelum pelikuidasiannya, Juara Aspirasi (M) Sdn Bd ('JAS'), pemaju perumahan berlesen, telah melaksanakan pembangunan satu unit apartmen yang terletak di Bandar Jelutong, Pulau Pinang ('hartanah tersebut'). JAS sebagai penjual telah memasuki perjanjian jual beli ('PJB pertama') untuk menjual hartanah tersebut kepada perayu untuk harga belian yang dipersetujui berjumlah RM35,000, yang mana harga belian itu perlu dijelaskan sepertimana cara yang dinyatakan dalam Jadual Keempat PJB pertama tersebut. Berikutan itu JAS telah memasuki perjanjian jual beli pertama berkenaan hartanah tersebut ('PJB kedua') dengan Mohd Ismail bin Md Ibrahim ('Ismail'). Harga belian yang dipersetujui berjumlah RM50,000 telah dijelaskan sepenuhnya oleh Ismail, yang kemudian telah menjual hartanah tersebut kepada responden ('PJB ketiga'), yang juga telah membayar harga belian sepenuhnya. Setelah memperoleh milikan kosong hartanah tersebut, responden telah memulakan kerja pengubahsuaian ke atas hartanah tersebut. Apabila perayu melawat hartanah tersebut dan mendapati responden menjalankan kerja pengubahsuaian ke atas hartanah tersebut, dia telah membuat laporan polis mengatakan bahawa seseorang telah menceroboh ke atas hartanah tersebut. Dalam pembelaannya responden mendakwa bahawa dia adalah pemilik benefisial hartanah tersebut, setelah membeli hartanah tersebut daripada Ismail bagi balasan dengan nilai. Oleh itu, responden

berhujah bahawa kilanan perayu, jika ada, hendaklah diarahkan kepada JAS yang mana dia telah menandatangani PJB pertama tersebut. Sementara itu, perayu telah memberitahu sehingga Januari Property Sdn Bhd, sebuah syarikat yang dikatakan mewakili JAS, bahawa PJB pertama tersebut telah ditamatkan dan melampirkan cek berjumlah RM5,250. Perayu telah membantah terhadap penamatan itu atas alasan bahawa JAS tiada sebab sah untuk menamatkan PJB pertama dan memulangkan cek itu kepada pemaju. Selepas itu, perayu telah memulakan tindakan terhadap responden dan JAS dengan mendakwa sebilangan relief deklarasi berkenaan kedudukan undang-undang ketiga-tiga PJB tersebut dan untuk satu injunksi bagi menghentikan responden daripada menceroboh ke atas hartanah tersebut. Dalam membantah tuntutan itu, responden menegasksn bahawa dia bukan pihak mahupun privi kepada Ismail dan oleh itu pembeli bona fide untuk nilai dengan faedah yang baik dan tetap dalam hartanah tersebut. JAS, yang sedang dalam pelikuidasian, telah membuat pendirian untuk tidak membela guaman itu. Hakim perbicaraan mendapati bahawa PJB pertama itu masih sah dan wujud dan boleh dikuatkuasakan dan bahawa jualan hartana berikutnya yang dikatakan itu oleh Ismail kepada respnden adalah tidak sah, terbatal dan tidak sah. Oleh itu, Mahkamah Tinggi membuat keputusan memihak kepada perayu dan membenarkan tuntutannya. Responden telah merayu kepada Mahkamah Rayuan, yang memutuskan bahawa responden adalah pembeli bona fide dengan nilai tanpa notis yang memberi perlindungan statutori yang diperuntukkan oleh s 340 Kanun Tanah Negara ('KTN'). Jika begitu, Mahkamah Rayuan memutuskan bahawa responden mempunyai hak milik tidak boleh disangkal terhadap hartanah tersebut. Perayu kemudian telah memohon untuk dan memperoleh kebenaran Mahkamah Persekutuan untuk meneruskan dengan rayuan ini. Perayu berhujah bahawa Mahkamah Rayuan telah melakukan kesilapan serius dan besar dari segi undang-undang kerana tersalahpakai s 340 KTN kepada fakta rayuan ini. Menurut perayu s 340(1) KTN tidak boleh terpakai kepada hartanah strata berkaitan di mana tiada dokumen hak milik daftar yang telah dikeluarkan oleh pihak berkuasa yang sewajarnya dan oleh kerana hak milik strata hartanah tersebut masih belum dikeluarkan, s 340 tidak terpakai kepada kes ini.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 340(1) KTN hanya merujuk kepada hak milik atau kepentingan berdaftar. Adalah alasan biasa bahawa pada tarikh matan tiada hak milik strata hartanah tersebut telah dikeluarkan oleh pihak berkuasa. Oleh kerana hak milik strata kepada hartanah tersebut tidak dikeluarkan, s 340(3) KTN tidak terpakai kepada kes ini (lihat perenggan 21 & 54).

(2) Prinsip pemilikan benefisiari membezakan antara hak-hak pembeli suatu hartanah yang telah menjelaskan sepenuhnya harga belian dengan seorang yang tidak berbuat demikian. Prinsip ini memberikan pembeli yang telah menjelaskan sepenuhnya harga belian dengan perlindungan

yang jelas sama seperti pemilik sah, meskipun dia masih belum berdaftar sebagai pemilik hartanah tersebut. Walaupun Mahkamah Tinggi dalam kes ini memutuskan bahawa prinsip pemilikan benefisiari tidak terpakai kerana kontrak yang dimasuki oleh pihak-pihak adalah dalam bentuk statutori sepertimana ditetapkan oleh Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta tersebut'), prinsip pemilikan benefisiari hendaklah terpakai sama kepada kedua-dua kontrak yang dirundingkan dan juga kontrak yang diformatkan secara statutori. Tiada alasan sah untuk membezakan antara dua transaksi itu. Niat Akta tersebut dan juga enakmen berikutnya dan perundangan kecil adalah hanya untuk melindungi pembeli yang berniat dan bukan diniatkan untuk membatalkan atau menjejaskan hak-hak pembeli di bawah common law atau dalam ekuiti. Oleh itu, berdasarkan autoriti-autoriti prinsip pemilikan benefisiari terpakai sama kepada kontrak dalam format statutori dan juga kontrak yang dirundingkan (lihat perenggan 36 & 40–43).

(3) Ia adalah lapuk bahawa dalam satu transaksi yang melibatkan harta bertanah, prinsip di bawah undang-undang kontrak akan mengawal transaksi jualan sehingga pendaftaran hak milik telah dilaksanakan di bawah peruntukan-peruntukan KTN. Oleh demikian, berdasarkan transaksi jual beli biasa, pembeli akan memperoleh, satu hak in rem atau hak in personam. Dengan mengguna pakai prinsip-pinsip perundangan kepada fakta kes ini adalah jelas bahawa responden, yang telah membayar harga belian sepenuhnya, adalah pemilik benefisiari hartanah tersebut dan menikmati hak in rem ke atas hartanah tersebut, manakala perayu, yang tidak membayar penuh harga belian hartanah tersebut, paling tidak telah diberikan hak in personam terhadap responden selepas pelaksanaan PJB pertama dan bayaran sejumlah RM5,250 kepada JAS Oleh itu, hak perayu bersifat kontraktual semata-mata terhadap JAS dan tiada kausa tindakan boleh terletak terhadap responden, yang merupakan orang asing kepada kontrak itu. Malangnya, perayu tiada remedi kerana JAS telah digulung (lihat perenggan 46, 48, 50–51 & 53).]

Notes

For cases on indefeasibility of title and interests in general, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3630–3796.

Cases referred to

Bachan Singh v Mahinder Kaur & Ors [1956] 1 MLJ 97 (refd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69, PC (refd)

Haji Abdul Rahman and another v Mahomed Hassan [1917] AC 209, PC (refd)

J Raju v Kwong Yik Bank Bhd & Anor [1994] 2 MLJ 408; [1994] 2 AMR 1220, SC (refd)

Kersah La'usin v Sikin Menan [1966] 2 MLJ 20 (refd)
Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC (refd)
Lysaght v Edwards (1876) 2 Ch D 499 (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294; [1994] 1 AMR 4, SC (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (refd)
Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149, FC (refd)
Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd [2008] 2 MLJ 87; [2008] 2 AMR 357, CA (refd)
Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC (refd)
SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)
Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal [2014] 1 MLJ 645; [2013] 9 CLJ 577, CA (refd)
Yeo Long Seng v Lucky Park (Pte) Limited [1971] 1 MLJ 20 (refd)

Legislation referred to

Federal Constitution arts 5(1), 8(1), 13
Housing Developers (Control and Licensing) Act 1966
National Land Code s 340, 340(1), (2)(b), (3)

Gopal Sri Ram (Chuah Yih Chuan & David Yii Hee Kiet with him) (Chooi, Sae & Lim) for the appellant.
Baldef Singh Bhar (Simon Muralli with him) (Lio & Partner) for the respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant (the plaintiff in the High Court) against the decision of the Court of Appeal in allowing the respondent's (the first defendant in the High Court) appeal. The Court of Appeal ruled that the first defendant was a bona fide purchaser for value without notice, hence is clothed with the statutory protection accorded by s 340 of the National Land Code ('the NLC'). That being the case, the Court of Appeal held that the first defendant has acquired an indefeasible title to the property.

[2] The second defendant named in the High Court proceeding was a developer company known as Juara Aspirasi (M) Sdn Bhd (the second defendant in the High Court), who is not a party before us. For ease of reference, we shall refer to the parties as they were cited in the High Court.

A QUESTION OF LAW

[3] On 19 May 2014, this court granted leave to the plaintiff to appeal against the decision of the Court of Appeal on the following two questions of law:

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(a) whether the principle of beneficial ownership established by the decision of the Federal Court in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 AMR 1537 applies to the statutory form of contract prescribed by the Housing Developers legislation.

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(b) whether s 340(1) of the National Land Code 1965 applied to immovable strata property in respect of which no register document of title has been issued by the appropriate authority.

D BACKGROUND FACTS

[4] The subject matter of the dispute is an apartment unit known as Unit 15-6, Level 15, Building No Block A, Villa Mas Ewani Apartments, Bandar Jelutong, Penang ('the property'). At all material times, prior to its liquidation, the second defendant was a licensed housing developer undertaking the construction and development of the property.

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[5] On 3 July 1996, a sale and purchase agreement was entered into between the second defendant as the vendor, the plaintiff as the purchaser and Goldencolt (M) Sdn Bhd as the proprietor of the land that was being developed. Among the terms of the sale and purchase agreement ('the first SPA') were:

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(a) the agreed purchase price of the property was RM35,000; and

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(b) the purchase price is to be settled in the manner spelt out in the fourth schedule to the agreement.

The first SPA was in the statutory format prescribed under the Housing

H Developers (Control and Licensing) Act 1966 ('the Act').

[6] On 1 November 2002 the second defendant entered into a fresh sale and purchase agreement in respect of the property with one Mohd Ismail bin Md Ibrahim ('Mohd Ismail') ('the second SPA'). The agreed purchase price was

I RM50,000 which was fully settled. Thereafter, on 31 May 2004, Mohd Ismail sold the property to the first defendant vide a sale and purchase agreement entered into and signed on the same day ('the third SPA'). Upon obtaining vacant possession of the property, the first defendant commenced renovation work on the property.

[7] On 20 January 2006, the plaintiff claimed he visited the property and discovered that the first defendant was carrying out renovation works on the property. He then lodged a police report alleging that he was the owner of the property and that someone had trespassed into the property.

[8] The plaintiff through his solicitor issued a notice of demand dated 10 March 2006 to the solicitor of the first defendant. The solicitor for the first defendant responded, in which it was categorically stated that the first defendant was the beneficial owner of the property, having purchased the property from Mohd Ismail for a valuable consideration. It was also pointed out in the letter that if there was any grain of truth in the allegation made by the plaintiff, his grievance ought to be directed towards the vendor with whom he signed the sale and purchase agreement, and not the first defendant.

PROCEEDINGS IN THE HIGH COURT

[9] In his amended statement of claim, the plaintiff states that he had received a letter dated 12 May 2004 from 'Januari Property Sdn Bhd', purportedly representing the second defendant, informing him that the first SPA had been terminated and enclosing a cheque for RM5,250. However, by a letter dated 19 May 2004, the plaintiff objected to the termination on the ground that the developer had no valid reason to terminate the first SPA. He returned the cheque to the developer. By another letter dated 3 June 2004, the developer reasserted the termination and again enclosed the said cheque. Again the plaintiff returned the cheque.

[10] The plaintiff contended that the first SPA was valid and enforceable and that the developer had no right to sell the property to another party. The plaintiff then commenced this action against the defendants herein. In summary, the plaintiff claimed was for a number of declaratory reliefs with regard to the legal status of the three SPAs and for an injunction to stop the first defendant from trespassing into the property.

[11] In opposing the claim, the first defendant averred that he was neither a party nor privy to the first and second SPAs. He contended that he had paid the full purchase price to Mohd Ismail and Mohd Ismail had, with the consent of the developer, assigned all the rights over the property to him vide a deed of assignment dated 20 May 2005. Upon obtaining possession, he commenced renovation works. He alleged that he is a bona fide purchaser for value having good and inviolable interest in the property.

[12] The second defendant was in liquidation and was represented at the High Court by an officer from the insolvency department. They took the stand not to defend the suit.

[13] The learned trial judge found in favour of the plaintiff and allowed the plaintiff's claim. He found that the first SPA remains valid and subsisting and enforceable. He also found that the alleged subsequent disposal of the property by Mohd Ismail to the first defendant was invalid, null and void. Since Mohd Ismail did not have any proprietary interest in the property accordingly, the first defendant, who purportedly entered into the third SPA with Mohd Ismail on 31 May 2004 could not have acquired any interest in the property *nemo dat quod non habet*. Further, he also found that the first defendant was not protected by the doctrine of a bona fide purchaser for value as he failed to prove that he had fully paid the purchase price to Mohd Ismail who was never called to confirm receiving the payment from the first defendant.

PROCEEDINGS IN THE COURT OF APPEAL

[14] Aggrieved by the decision of the High Court, the first defendant appealed to the Court of Appeal. In allowing the first defendant's appeal, the Court of Appeal made the following findings:

> [22] We find no evidence to show that the appellant had acted in concert with Mohd Ismail to effect the disposition of the property. It is apparent that the appellant had no knowledge about the first SPA and the second SPA.

[15] The Court of Appeal further held that:

> [23] We find that the appellant has shown that he was a bona fide purchaser for value without notice and therefore he is clothed with the statutory protection accorded by s 340 of the NLC. Consequently the appellant has acquired an indefeasible title to the property. We agree with learned counsel for the appellant that the respondent's remedy would be against the developer for breach of contract.

THE ISSUES BEFORE THIS COURT

[16] In view of the submissions of counsel before us, we will first address question No 2. The questions reads:

Question 2

> Whether s 340(1) of the National Land Code applied to immovable strata property in respect of which no register document of title has been issued by the appropriate authority.

The plaintiff's submission

[17] Learned counsel for the plaintiff submitted that the Court of Appeal committed a serious and fundamental error of law by misapplying s 340 of the NLC to the facts of the present appeal. He submitted that, it is trite that s 340 only applies where there exists a registered title or interest. This is reflected through its provision which begins with words, 'The title or interest of any person or body *for the time being registered as proprietor* ...'. (Emphasis added.)

[18] He contended that, the provision confers upon the registered proprietor or any person having registered title or interest in the land deferred indefeasibility. Under s 340(2)(b) of the NLC, the registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title. The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith for valuable consideration. In other words, a registered proprietor, under a sale and purchase agreement, may or confer an indefeasible title to a bona fide purchaser for value even though he himself does not possess an indefeasible title, (see *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269; *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645; [2013] 9 CLJ 577).

[19] Learned counsel for the plaintiff contended that, in this case the strata title of the property is yet to be issued. Neither Mohd Ismail nor the first defendant has been registered as owner of the property. Therefore, s 340 has no application to the present case.

The defendant's submission

[20] Learned counsel for the first defendant agreed that the Court of Appeal had erred in relying on the proviso to s 340(3) of the NLC. He conceded that the proviso has no relevance to the factual matrix of the case.

Our finding to question No 2

[21] We entirely agree with the plaintiff's submission, as rightly conceded by learned counsel for the first defendant, the proviso to s 340(3) of the NLC does not apply to the present case as the strata title is yet to be issued at the material date. This is premised on the fact that s 340(1) of the NLC only speaks of registered title or interest. It is common ground that at the material date no strata title in respect of the property has been issued by the authority.

Question 1

Whether the principle of beneficial ownership established by the decision of the

A Federal Court in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 AMR 1537 applies to the statutory form of contract prescribed by the Housing Developers legislation.

The plaintiff's submission

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[22] Learned counsel for the plaintiff submitted that the principle of beneficial ownership established in *Borneo Housing Mortgage Finance Bhd* does not apply to the statutory form of contract prescribed by the Act. On the contrary, he submitted the purchaser of a housing development acquires C beneficial ownership upon entering into the sale and purchase agreement in the statutory format prescribed by the Act notwithstanding that he had not paid the full purchase price for the property.

D **[23]** Learned counsel for the plaintiff contended that the intendment of the housing developers legislation is to provide for the protection of the interest of purchasers. That interest according to him, cannot be protected if a purchaser only obtains beneficial interest in the property 'after the vendor's receipt of the full purchase price, paid timely, and when the vendor has given the purchaser E a duly executed, valid and registrable transfer of the land in due form'. In support, learned counsel relied on the Singapore case of *Yeo Long Seng v Lucky Park (Pte) Limited* [1971] 1 MLJ 20, where Winslow J held that:

> The object of the ordinance and rules made thereunder is to control developers and to protect bona fide purchasers. If, therefore, a purchaser had agreed in a document F such as AB2 to purchase a particular lot in question from the defendants according to the terms set out in that document, having paid a booking fee of $500, which the law has seen fit to provide as the only amount which a vendor could demand as a first deposit, and if all that remained to be done by the purchaser was to sign a document as required by the Rules, I find it difficult to understand how any G complaint can be made that when the plaintiff or anybody in his situation signed the document after, at the same time, having paid the booking fee, there was no legally enforceable contract at common law, at least, between the parties.'

Learned counsel for the plaintiff also relied on the case of *Rasiah Munusamy v* H *Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291.

[24] Learned counsel for the plaintiff further submitted that the Act was intended to protect the interest of purchasers in accord with the principle of beneficial interest enunciated by Jessel MR in *Lysaght v Edwards* (1876) 2 Ch I D 499.

[25] It was also implored upon us by learned counsel for the plaintiff that in relying on the principle of 'equity will not suffer a wrong to be without remedy', the trial judge was right in granting injunctive relief in favour of the

plaintiff to recover vacant possession. He explained that under the Torrens system of land registration, the plaintiff is not entitled to enter a private caveat to protect his interest in the property. This was due to the fact that strata title has not been issued despite the completion of the development. Thus, the NLC offered no protection to the plaintiff to prevent the second defendant from disposing the property to a related party, who then disposed it to the first defendant. Unlike the first defendant who may seek an appropriate relief against the said Mohd Ismail, the plaintiff is without any remedy against the second defendant as it is already wound up.

[26] Learned counsel for the plaintiff further argued that the plaintiff is a bona fide purchaser. It was the second defendant who failed to deliver the vacant possession of the property in time under the sale and purchase agreement. Furthermore, the plaintiff did not breach any terms and conditions of the agreement. It was further submitted that, although there was a balance of RM 28,000 to be paid towards the purchase price of the property, the plaintiff is entitled to set off the balance against the liquidated damages for late delivery of vacant possession of the property to the plaintiff. In support, learned counsel for the plaintiff cited *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31.

The first defendant's submission

[27] In reply, learned counsel for the first defendant contended that the principle of beneficial ownership set forth in the case of *Borneo Housing Mortgage Finance Bhd* applies equally to statutory form of contract prescribed by the Act. In support, he relied on three main grounds.

[28] First, he submitted that the principle of beneficial ownership is an alternate reference to a legal concept known as the doctrine of bare trust. This principle clothes a purchaser who has settled the purchase price for a property with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as proprietor of it. The beneficial or equitable owner of the property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that the beneficial owner is yet to be vested with the legal title. Under this principle, the vendor becomes a bare trustee for the purchaser vis-à-vis the transacted property, while the purchaser assumes the position of beneficial owner having a right in rem over the property.

[29] In contrast, he submitted, a purchaser who has not settled the full purchase price does not enjoy such benefit. The right of such purchaser is purely contractual in nature. He has a right in personam. He or she does not have any right over the property. In the event of dispute, such purchaser can

only institute action against the vendor with whom he or she has contracted. In support, learned counsel for the first defendant relied on the case of *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 408; [1994] 2 AMR 1220 (SC); *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; [1994] 1 AMR 4 and *Borneo Housing Mortgage Finance Bhd*.

[30] This principle of beneficial ownership, learned counsel contended, applies with equal force to a sale and purchase transaction in the statutory format as prescribed under the Act.

[31] Secondly, counsel for first defendant submitted that the legal principle governing transaction of immovable properties must reflect uniformity and consistency. It was submitted that the right to own a house is a fundamental right under arts 5(1) and 13 of the Federal Constitution. Therefore, it is important that the law applies equally in all cases. This is in accord with the equality principle enshrined under art 8(1) of the Federal Constitution.

[32] Thirdly, counsel for the first defendant submitted that the principle of beneficial ownership accords distinct rights to a purchaser of a property who has fulfilled his contractual obligation under the sale and purchase agreement. He agreed that the legislative intent of the Act as well as the subsequent enactments and the subsidiary legislations is to protect the intended purchaser. However, he contended that housing developers' legislation is never intended to abrogate or undermine the rights of a purchaser under the common law or in equity.

OUR FINDING

The principle of beneficial ownership

[33] We will begin with an elucidation of the principle of beneficial ownership which we think is crucial to this case.This principle of beneficial ownership was alluded to by Edgar Joseph JR in *Borneo Housing Mortgage Finance Bhd* where he observed:

> ... the contractual events which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, *upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser*, for it is then the vendor divest himself of his interest in the land. (Emphasis added.)

[34] According to this principle, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the

registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner.

[35] This is clearly demonstrated by the case of *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 408; [1994] 2 AMR 1220, where the Supreme Court held that:

> ... the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it on the purchaser at the time when the purchase money had been paid in full.

(see also *M & J Frozen Food Sdn Bhd* and *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149).

[36] The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

[37] Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right in rem over the property. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC.

[38] On the other hand, a purchaser who has not settled the full purchase price does not enjoy such benefit. The right of such purchaser is contractual in nature and in personam. He or she does not have any beneficial interest in the property. In the event of dispute, such purchaser can only institute action against the vendor with whom he or she has contracted. In other words, such purchaser merely enjoys a contractual right or a right in personam.

[39] In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.

The application of the principle of beneficial ownership

[40] In the case before us, the High Court held that the principle of bare trust

as enunciated in the case of *Borneo Housing Mortgage Finance Bhd* discussed above does not apply because the contract entered upon by the parties was in the statutory form as prescribed by the Act.

[41] With respect, we are of the view that the principle of beneficial ownership should apply equally to both negotiated contracts as well as statutorily formatted contract. We are of the considered view that there is no valid reason to distinguish between the two transactions.

[42] We agree with counsel for the first defendant that the intention of the Act as well as the subsequent enactments and the subsidiary legislations is to merely protect the intending purchaser. It is not intended to abrogate or undermine the rights of purchaser under the common law or in equity. This is in line with the observation of the Privy Council in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 (PC) stated:

> ... the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

(see also *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87; [2008] 2 AMR 357 (CA)).

[43] Therefore, on the authorities we agree with the first defendant that the principle of beneficial ownership applies equally to a contract in a statutory format as well as a negotiated contract.

The distinction between right ad rem or a right in personam and a right in rem?

[44] In the present case it was a finding by the High Court that the first SPA is still valid and subsisting. The High Court did not accept the termination letter ('P14') on the ground that P14 was sent by Januari Properties Sdn Bhd, who was not a party to the first SPA. The High Court also opined that although the plaintiff had only paid RM5,250, but, it was not the reason for such termination.

[45] It was also the finding by the High Court that since the plaintiff has not fully paid the purchase price and that the strata title to the property is yet to be issued, the plaintiff has no beneficial interest over the property. Nevertheless, the High Court found that the plaintiff has acquired a legal right over the property since the first SPA is still valid and subsisting.

[46] It is trite that in a transaction involving landed property, the principle under the law of contract will govern the sale transaction until registration of title is effected under the provision of the NLC. Lord Dunedin in the case of

Haji Abdul Rahman and another v Mahomed Hassan [1917] AC 209 held that:

> The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.

The Privy Council in this case explained that any transaction which was not done in accordance with the then existing law relating to registration of title conferred no real right to the land but merely a contractual right.

[47] Raja Azlan Shah J (as His Lordship then was) following the Privy Council decisions in *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 and *Haji Abdul Rahman and another* took a similar stand in *Kersah La'usin v Sikin Menan* [1966] 2 MLJ 20 where he held that an unregistered transfer of land merely gives the purchaser a right which rests in contract.

[48] Therefore, based on the ordinary sale and purchase transaction, the purchaser will acquire, a right ad rem or a right in personam. These rights will be conferred to the purchaser immediately after contracting parties entered into a contract for the sale and purchase of property. This was explained by Thomson J, in *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97 in the following words:

> ... the point is that when that contract was made the *purchasers acquired a right ad rem and in personam* to the land which so far as the vendor was concerned they were entitled to have erected into a real right. I am not prepared to say that that amounted to an equitable right. I prefer to regard it as a legal right of the nature of a chose in action. (Emphasis added.)

[49] His Lordship further explained the difference between a right ad rem and a right in rem, as follows:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between *rights ad rem or personal rights and rights in rem or real rights*. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right ad rem which is also a right in personam. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code ... (Emphasis added.)

(see also *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; and *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45).

[50] Applying the above principle to the facts in the present case, we hold that the plaintiff is at best clothed with a right ad rem or a right in personam as

against the second defendant upon the execution of the first SPA and payment of the sum of RM5,250 to the second defendant. The plaintiff's right rests solely in contract as against the second defendant and no cause of action could lie against the first defendant who is a complete stranger to the contract. We are supported in our view by what was said by Edgar Jospeh JR in *Borneo Housing Mortgage Finance Bhd* that:

> In our view, it is not a correct description of the relationship between parties to a contract of sale and purchase of land, ... that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. *At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.* (Emphasis added.)

[51] In the present case the plaintiff is unfortunately left without remedy as the second defendant had been wound up.

The right of the first defendant

[52] The first defendant acquired his right through Mohd Ismail from whom he bought the property. Having paid the full purchase price, in law he assumed the position of a beneficial owner. The plaintiff claimed that Mohd Ismail is a brother to one Mohamed Yusoff bin Mohd Ibrahim, who was a director and shareholder of the second defendant developer, and thus, it is fair to assume that Mohd Ismail has actual notice of the plaintiff's interest on the property. However, we find, there is no evidence to show that the information has ever been communicated to Mohd Ismail or to the first defendant. The fact that Mohd Ismail and Mohd Yusoff are brothers does not automatically give rise to a conclusion that Mohd Ismail has had notice of the earlier SPA. Further there is not an iota of evidence to show that there had been a collusion or conspiracy between the first defendant and Mohd Ismail. On that premise we hold that the first defendant is an innocent purchaser for value without notice. In the result we agree with learned counsel for first defendant that the first defendant as the beneficial owner of the property enjoys what is referred as a right in rem over the property.

CONCLUSION

[53] For the reasons set out above, our answer to first question is in the positive. On the facts of the present case, it is our finding that the plaintiff is not vested with beneficial interest in the property as he had not paid the full purchase price of the property. The plaintiff's right in the circumstances is purely contractual in nature as against the second defendant.

[54] As the strata title to the property has not been issued, therefore, the proviso to sub-s (3) of s 340 of the NLC does not apply to the instant case.

Thus, our answer to the second question is in the negative.

[55] We accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan